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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ANTHONY ALLEN, on Habeas Corpus.	A123618 (San Mateo County Super. Ct. No. SC031146A)

In 1994, petitioner Anthony Allen was sentenced to a term of 15 years to life after entering a guilty plea to second degree murder. The Board of Parole Hearings (Board) denied parole for the second time on July 27, 2006, and set the next parole hearing in four years. Petitioner sought a writ of habeas corpus from the San Mateo County Superior Court, which was denied. After he filed a petition for such a writ in this court, we issued an order to show cause.[1] In light of recent, posthearing California Supreme Court decisions that clarified the law regarding parole suitability (*In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*)), we reverse the Board's decision and remand for reconsideration.

BACKGROUND

1. The Commitment Offense and Proceedings in the Trial Court

On April 14, 1992, petitioner and three other members of the Midtown Gang shot at a group of four people in East Palo Alto, killing one and wounding three others.

[1] Our order to show cause instructed counsel to address two issues—"both the decision to deny parole and the decision to delay petitioner's next parole hearing for four years." Given our conclusion on the first issue, the length of denial is moot and, therefore, we do not address it.

Petitioner shot and killed John McGeehee, a childhood friend, who died from a .40 caliber gunshot wound to the neck; Jason McGeehee, John's brother, was shot several times in the torso; Lisa Page suffered one gunshot wound to the leg; and Darren Trehan was shot in the abdomen and as a result is now a paraplegic. According to the probation officer's report, the motive behind the shooting was that one of the codefendants, Travis Outlaw, was jealous that his ex-girlfriend was dating Trehan. Outlaw had previously shot at Trehan at least two different times in the two days preceding the commitment offense: once when they ran into each other at party on April 12, and a second time on the road on April 13.

Although petitioner did not testify at the Board hearing regarding the commitment offense (because of pending federal court litigation), the offense summary prepared by California Department of Corrections and Rehabilitation (CDCR) staff related petitioner's version: He and his three friends were fired upon while driving a rental car. When everyone ducked to avoid the bullets, the car crashed into a pole. Petitioner and his friends then grabbed their handguns and jumped out of the car, at which point they were shot at by Jason McGeehee. The group ran towards Jason and returned fire in his general direction. They then got back in the car and left the scene.[2]

Petitioner and the others he was with were eventually arrested; petitioner was found in possession of the .40 caliber handgun used to kill John McGeehee. A group plea bargain was negotiated and all four pled guilty; petitioner pled guilty to second degree murder, while the others pled guilty to reduced charges ranging from assault to attempted murder.

[2] The Board cited a 2006 report by Correctional Counselor D. Neel for both the summary of the offense contained in the probation report and for the summary of petitioner's version of the events. That report is not included in the record, but petitioner did include a 2001 report, which also recites petitioner's version of the events.

2. The 2006 Board Hearing

As noted above, petitioner elected not to testify about the commitment offense[3] and, therefore, there was little discussion at the hearing about the offense beyond the summaries discussed above. The hearing focused instead on petitioner's prior criminal history and conduct while in prison. The Board noted that petitioner's criminal history began in 1986 with juvenile adjudications for "vehicle theft, continuing with possession [of] controlled substances for sale, auto theft, receiving stolen property, vehicle theft, possession of stolen property, and proceeded into adult convictions and arrests involving more Vehicle Code Sections."

Petitioner has performed well in prison. He has a relatively insignificant discipline history, with only one serious violation (or "115") for failing to report for a work assignment, and five minor violations (or "128A's") for failing to take his "TABE" test and not reporting to work. The most recent violations—the "115" and one of the "128A's"—were committed in 2000. The second most recent "128A" was nine and one-half years old at the time of the hearing; the rest took place in the mid 1990's.

In addition to having stayed relatively discipline-free, petitioner has shown progress in job training and has an exceptional work history. He has obtained several vocational certificates in computer refurbishing and sandblasting. Since 2004, his work evaluations have all been "excellent." Petitioner has also participated in several self-help programs, including anger management, stress management, and violence prevention.

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[3] Under section 2236 of title 15 of the California Code of Regulations, the "prisoner may refuse to discuss the facts of the crime" at the parole hearing. That section provides in its entirety: "The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner. Written material submitted by the prisoner under [section] 2249 relating to personal culpability shall be considered."

All further references to regulations are to title 15 of the California Code of Regulations.

His most recent psychological report, dated July 10, 2006, is also favorable. It notes petitioner's positives steps while in prison and that it "appears" he has "developed some insight and understanding in regard to his life crime." The report concludes that petitioner's "potential for violence is considerably reduced by his maturation, his insight and judgment, his age, deliberate choice of affiliations, and the absence of a substance abuse or serious mental disorder." As such, the report concludes that petitioner's "risk of dangerousness in this institutional setting [is] lower than that of the average inmate incarcerated here, and consistent with those inmates who have had successful paroles in the community." The psychological report does not, however, discuss certain discrepancies between petitioner's version of the commitment offense and the official version.

3. The 2006 Board Decision

In denying parole, the Board relied primarily upon the facts of the 1992 commitment offense. It found the offense to be carried out in a callous, dispassionate, and calculating manner. Petitioner's prior criminal history was also cited by the Board. Finally, the Board noted that petitioner's parole plans did not include any job offers, but acknowledged that he possessed "marketable skills" in computer refurbishing. These same factors were cited in support of delaying his next hearing for four years, until 2010.

DISCUSSION

Under Penal Code section 3041, subdivision (b), "parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) In determining suitability for parole, "the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1205; see Pen. Code, § 3041; Regs., §§ 2281, 2402.)

The parole regulations direct the Board to consider all available relevant and reliable information to determine parole suitability. (Regs., § 2281, subd. (b).) The

regulations first give general instructions to consider the prisoner's social history, mental state, criminal history, etc. (*ibid.*), and then set forth specific (but nonexclusive) circumstances tending to show unsuitability or suitability for parole (*id.*, subds. (c), (d)). Specific circumstances tending to show unsuitability include a commitment offense committed in an especially heinous, atrocious, or cruel manner; a previous record of violence; an unstable social history; a history of severe mental problems related to the offense; and serious misconduct in prison. (*Id.*, subd. (c)(1), (2), (3), (5), (6).)

Board decisions are upheld if supported by "some evidence" but, prior to the decision in *Lawrence*, our appellate courts were split on the meaning of that test. Some courts upheld parole decisions if some evidence supported the factors cited by the Board in denying parole (including the egregiousness of the offense). (See *Lawrence, supra,* 44 Cal.4th at pp. 1207-1208.) Other courts—including this division—have concluded "that an inquiry focused only upon the existence of unsuitability factors fail[ed] to provide the meaningful review guaranteed by the due process clause." (*Id.* at p. 1208.) Instead, those courts examined whether there was some evidence to support a finding the inmate continued to be a threat to public safety. (*Id.* at pp. 1208-1209.)

In *Lawrence*, the California Supreme Court, embracing our view, resolved the uncertainty: " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212, italics omitted; see also *Shaputis*, *supra*, 44 Cal.4th at p. 1254.)

Here, the Board cited two factors in denying parole, but never established a rational nexus between those factors and a finding that petitioner remains a threat to

public safety. Moreover, the two factors cited by the Board—the gravity of the commitment offense and petitioner's criminal history—are immutable factors that never change even if the inmate has been completely rehabilitated. As *Lawrence* explains, immutable factors such as the aggravated nature of the crime or prior criminal history do not in and of themselves provide some evidence of current dangerousness to the public. (*Lawrence, supra*, 44 Cal.4th at p. 1214.)

The Attorney General does not suggest otherwise. Instead, the Attorney General argues that petitioner's prior criminal history—coupled with his gang membership—shows he continues to be dangerous. The Attorney General maintains that the commitment offense was not an isolated incident, as in *Lawrence*. He claims that, as in *Shaputis*, petitioner's "crime was 'the culmination of many years of violent . . . behavior,' and as such is still relevant to a determination of his current dangerousness."

Petitioner does not, however, have a record of violent crime. According to the Board, his prior offenses consist of theft crimes, Vehicle Code violations, and a juvenile adjudication of possession of a controlled substance for sale. Thus, the offense was not the culmination of many years of violent crime.[4]

While it may be true, as the Attorney General argues, that these crimes could fit within petitioner's "gang lifestyle," the Board did not tie this "fact" to petitioner's current dangerousness, almost a quarter of a century later. Nor is it apparent how such a fact, in and of itself, would indicate current dangerousness. Much like the facts of the commitment offense and prior criminal history, the fact that one's prior record and the

[4] There is a discrepancy in the record as to petitioner's criminal history. As noted above, the Board limited petitioner's criminal history to Vehicle Code violations, and theft and drug charges. But during his examination at the hearing, petitioner's attorney stated, "I know that you had one prior for a weapons carrying charge, and other than that only vehicle code violations." The confusion is compounded by the 2001 Life Prisoner Evaluation Report, which includes a 1991 conviction for violation of a non-existent Penal Code section (12025.9(a)). That section, if it did exist, would be in title 2, chapter 1, article 2 of the Penal Code, which is entitled "Unlawful Carrying and Possession of Weapons." Regardless, even including a concealed weapons conviction, this is not a record replete with violent crime.

commitment offense fall into a "gang lifestyle" is an immutable factor the mere existence of which cannot be deemed indicative of current dangerousness. Thus, even if petitioner engaged in a "gang lifestyle" decades ago, the Attorney General has failed to show how it would demonstrate his continued dangerousness.

Finally, and importantly, petitioner's prison behavior and psychological record is not at all analogous to that of the inmate in *Shaputis*. There, the court observed that Shaputis's "character remains unchanged and . . . he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming.' " (*Shaputis, supra*, 44 Cal.4th at p. 1260.) Here, there is no such evidence. Petitioner has a good disciplinary history in prison, positive psychological evaluations, and strong work history.

While the reasons stated by the Board may not be sufficient to deny parole, that does not necessarily mean petitioner is ready for parole. The record before us is missing key information on petitioner's *present* attitude towards the commitment offense and what that present attitude reveals about petitioner's current dangerousness. Petitioner has in the past claimed he did not use the murder weapon and that he and his friends had acted in self-defense. That version is reflected in the offense summary read into the record at the 2006 Board hearing, in the 2001 Life Prisoner Evaluation Report petitioner supplied as an exhibit to this petition, and in his 1997 petition for writ of habeas corpus, where he sought to withdraw his guilty plea by arguing that he acted in self-defense.

On the other hand, the 2006 psychological report states that petitioner "acknowledge[s] culpability for his commitment offense and his statements are consistent with statements that he had previously expressed." It concludes that petitioner "appears to have developed some insight and understanding in regard to his life crime."

Complicating this is that petitioner did not discuss the commitment offense at the hearing. While he need not do so (see Regs., § 2236), his current view of his responsibility for the offense is unclear. Nor is it clear whether his current view indicates that he is currently dangerous. (See, e.g., *In re Palermo* (2009) 171 Cal.App.4th 1096,

1110-1112 [continued insistence that killing was an accident and not intentional is not evidence in and of itself that the prisoner posed a danger to public safety].)

While there is some evidence in the present case to support the factors the Board cited in denying parole, under *Lawrence*, *supra*, 44 Cal.4th 1181, that determination is insufficient to uphold the Board's denial of parole. The record contains no evidence supporting the Board's ultimate conclusion that petitioner remains a threat to public safety. We cannot presume the Board would have reached the same decision in this case had it applied the parole suitability standards subsequently articulated in *Lawrence* and *Shaputis*. Under the circumstances of this case, we believe the only appropriate course is to allow the Board to conduct a new parole hearing in light of *Lawrence* and *Shaputis*. (See *In re Criscione* (2009) 173 Cal.App.4th 60, 78-79; but see *In re Gaul* (2009) 170 Cal.App.4th 20, 41 [directing Board to find prisoner suitable for parole absent misconduct in prison subsequent to the parole hearing under review].) Accordingly, we reverse the Board's decision and remand the matter for reconsideration in light of *Lawrence* and *Shaputis*, and also in light of the discussion in this opinion, within 60 days of the finality of this decision.

DISPOSITION

The Board's decision is reversed. The matter is remanded to the Board for reconsideration in light of *Lawrence*, *Shaputis*, and this decision, within 60 days of the finality of this decision.

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.